Veeran a/l Veeriah v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS P-05(M)-184–05 OF 2016 AND P-05(M)-186–05 OF 2016
ZAWAWI SALLEH, IDRUS HARUN AND KAMARDIN HASHIM JJCA
13 NOVEMBER 2017

Criminal Procedure — Appeal — Appeal against convinction and sentence — Offence of murder — Common intent — Whether accused and accomplices had common intention to cause death or bodily injury to deceased which appellants knew to be likely to cause deceased's death — Penal Code ss 300 & 302

Two appeals, based on common core of facts and issues, were heard together. At the High Court, the appellants were charged for an offence of murder under s 302 of the Penal Code. The prosecution relied on the narration by an eyewitness ('PW12'), who testified that the appellants and three others ('the accomplices') came and slashed the deceased repeatedly with long machetes. PW12 tried to stop them. They chased the deceased and continued to hack the latter. A post-mortem showed that there were 22 serious slash wounds found on the deceased's limbs which clearly showed that the appellants and their accomplices had the intention to kill the deceased. The appellants were charged at the High Court and upon a maximum evaluation of the evidence, the trial judge concluded that the appellants' act constituted murder which fell under s 300(b) of the Penal Code as such act was done with the intention to cause bodily injury to the deceased which the appellants knew to be likely to cause the deceased's death. In their respective defences, the first appellant submitted that he was at the crime scene to stop the fight while the second appellant submitted that he left the scene while the fight continued. In finding the appellants' defence to be bare denials, the High Court judge held that the defence failed to raise a reasonable doubt on the prosecution's case. The appellants were found guilty, convicted for the offence and sentenced to death. Hence the present appeal.

Held, dismissing the appeals:

(1) PW12's testimony showed that the appellants and the accomplices were acting in concert when they were seen arriving at the crime scene together and hacking the deceased. The combined effect of their acts, the weapons used and the multiple injuries inflicted on the deceased clearly evinced an intention on the appellants' part to cause the deceased to die or sufficiently showed knowledge on the part of the appellants that the

injuries inflicted would likely cause the death of the deceased thus bringing their act to fall under s 300(a) and (b) of the Penal Code (see paras 15 & 18).

(2) Their criminal act was in furtherance of the common intention of all of them to cause the death of the deceased or to cause the injuries which they knew to be likely to cause the death of the deceased. Therefore, s 34 of the Penal Code applied to this case. Each of them, by virtue of s 34 of the Penal Code, was liable for the injuries by which the deceased's death was caused as if the injuries were done by him alone. There was no legal requirement on the part of the prosecution to prove who actually caused the death of the deceased or who was exactly the actual doer of the offence in question (see paras 18–19).

(3) PW12 was a credible witness whose evidence could be and was, in fact, acted upon by the trial court. The appellants and their accomplices did not wear any mask and there was no obstacle that could prevent PW12 from recognising them. Besides, PW12 had known the appellants prior to the incident as they lived in the same residential area. There was positive evidence about the identity of the appellants. PW12 would not have known the appellants' culpability together with the accomplices if he did not witness the murder. There was no ill motive show or suggested to PW12 or there was no basis for suspecting the appellants had prompted PW12 to give their names to the police (see paras 22, 35 & 43).

[Bahasa Malaysia summary

Dua rayuan, berasaskan fakta dan isu asas yang sama, dibicarakan bersekali. Di Mahkamah Tinggi, perayu dipertuduh atas kesalahan membunuh bawah s 302 Kanun Keseksaan. Pihak pendakwaan bersandar pada keterangan seorang saksi mata ('PW12'), yang memberi keterangan bahawa perayu-perayu dan tiga yang lain ('rakan-rakan jenayah') datang dan mengelar si mati beberapa kali dengan parang panjang. PW12 cuba menghentikan mereka. Mereka mengejar dan teruk menetak si mati. Bedah siasat mendedahkan bahawa terdapat 22 luka kelaran serius yang dijumpai pada anggota badan si mati yang jelas menunjukkan perayu-perayu dan rakan-rakan jenayah mereka berniat membunuh si mati. Perayu-perayu dipertuduh di Mahkamah Tinggi dan selepas penilaian maksimum keterangan, hakim bicara memutuskan tindakan perayu-perayu terjumlah sebagai pembunuhan yang tergolong bawah s 300(b) Kanun Keseksaan kerana tindakan tersebut dilakukan dengan niat menyebabkan kecederaan badan pada si mati yang, perayu-perayu ketahui, berkemungkinan akan menyebabkan kematian si mati. Dalam pembelaan masing-masing, perayu pertama menghujahkan dia berada di tempat kejadian untuk menghentikan pergaduhan manakala perayu kedua menghujahkan dia meninggalkan tempat kejadian sementara pergaduhan tersebut masih berterusan. Dalam mendapati pembelaan perayu-perayu adalah penafian

A semata-mata, Hakim Mahkamah Tinggi memutuskan pembelaan gagal membangkitkan keraguan munasabah terhadap kes pendakwaan. Perayu-perayu didapati bersalah, disabitkan atas kesalahan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini difailkan.

B **Diputuskan**, menolak rayuan-rayuan:

(1) Keterangan PW12 menunjukkan perayu-perayu dan rakan-rakan jenayah mereka bertindak bersama-sama apabila mereka tiba di tempat kejadian bersama-sama dan menetak si mati. Kesan gabungan tindakan
C mereka, senjata-senjata yang digunakan dan beberapa kecederaan pada si mati jelas menunjukkan niat perayu-perayu untuk menyebabkan kematian si mati atau menunjukkan perayu-perayu mempunyai pengetahuan yang mencukupi bahawa kecederaan-kecederaan ini berkemungkinan akan menyebabkan kematian si mati, menjadikan
D tindakan mereka tergolong bawah s 300(a) dan (b) Kanun Keseksaan (lihat perenggan 15 & 18).

(2) Tindakan jenayah mereka adalah lanjutan niat bersama kesemua mereka untuk menyebabkan kematian si mati atau menyebabkan kecederaan
E yang mereka ketahui berkemungkinan menyebabkan kematian si mati. Oleh itu, s 34 Kanun Keseksaan terpakai pada kes ini. Setiap seorang mereka, bawah s 34 Kanun Keseksaan, bertanggungan bagi kecederaan yang menyebabkan kematian si mati, seolah-olah kematian dilakukan oleh dia seorang. Tiada syarat-syarat perundangan yang menetapkan
F pihak pendakwaan harus membuktikan siapa yang sebenarnya menyebabkan kematian si mati atau siapa yang sebenarnya melakukan kesalahan yang dipertikaikan (lihat perenggan 18–19).

(3) PW12 adalah saksi kredibel yang keterangannya boleh jadi malahan menjadi sandaran mahkamah bicara membuat keputusan.
G Perayu-perayu dan rakan-rakan jenayah mereka tidak memakai apa-apa topeng dan tiada kesukaran buat PW12 mengecam mereka. Di samping itu, PW12 mengenali perayu-perayu sebelum kejadian tersebut kerana mereka tinggal di dalam kawasan kejiranan yang sama. Terdapat keterangan pengecaman positif perayu-perayu. PW12 tidak mungkin
H tahu tentang kebertanggungan perayu-perayu bersama-sama dengan rakan-rakan jenayah mereka jika dia tidak menyaksikan pembunuhan tersebut. Tiada motif jahat yang ditunjukkan atau dicadangkan kepada PW12 atau tiada asas untuk mengesyaki perayu-perayu mencadangkan PW12 memberi nama-nama mereka kepada polis (lihat perenggan 22,
I 35 & 43).]

Notes

For cases on appeal against convinction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Abdulloh Saofi v PP [2013] 2 MLJ 640, CA (refd)
Ahmad Majmi bin Idris & Anor v PP and another appeal [2014] 3 MLJ 368; [2014] 1 LNS 148, CA (refd)
Arumugam a/l Shanmugam v PP [2014] 5 MLJ 443, CA (refd)
Aung Thun & Anor v PP and another appeal [2014] 1 MLJ 784, CA (refd)
Chandran a/l Paskaran v PP [2011] 3 MLJ 731; [2011] 2 CLJ 585, CA (refd)
DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
DP Vijandran v Karpal Singh & Ors [2000] 3 MLJ 22, HC (refd)
Deepanraj a/l Subramanian v PP [2016] 1 MLJ 413; [2015] CLJ 439, CA (refd)
Kumar Gopika Raman Roy v Atal Singh AIR 1929 PC 99, HC (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (distd)
Mohd Bakri bin Belaho v PP [2008] 1 MLJ 190, CA (refd)
Muharam bin Anson v PP [1981] 1 MLJ 222, FC (refd)
Pendakwa Raya v Arumugam a/l Shanmugam [2013] MLJU 155; [2013] 1 LNS 57, HC (refd)
Pie bin Chin v PP [1985] 1 MLJ 234 (refd)
PP v Basar [1965] 1 MLJ 75 (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
PP v Oh Laye Koh [1994] 2 SLR 385, CA (refd)
Tan Kim Hoo v PP & another appeal [2007] 6 CLJ 557 (refd)
Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175, FC (refd)

Legislation referred to

Evidence Act 1950 ss 40, 41, 42, 43
Penal Code ss 34, 300(a), (b), 302, 302(a), (b)

Appeal from: Criminal Trial No 45B–33–11 of 2014 (High Court, Pulau Pinang)

RSN Rayer (R Nethaji Rayer & Co) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Idrus Harun JCA:

INTRODUCTION

[1] This appeal and Criminal Appeal No P-05(M)-186–05 of 2016 were heard together as they arose from the same criminal trial in the Penang High Court under Criminal Trial No 45B-33–11 of 2014. The appeals, therefore, were related whilst undeniably involving the same accused persons besides the same common core of facts and issues. We propose to give reasons for our

decisions with respect to these appeals in one common judgment. We shall, in this judgment, refer to the appellant in this appeal as the first appellant and the appellant in Appeal No 186 as the second appellant. Before proceeding further, we may necessarily mention that both appellants were convicted of an offence of murder under s 302 of the Penal Code and consequently sentenced to death by the High Court. The appeals before this court were against the order of such conviction and sentence. We shall now set out the charge upon which the appellants were convicted and sentenced as aforementioned:

> Bahawa kamu bersama-sama dengan seorang lagi yang telah dituduh, seorang lagi yang masih bebas dan seorang lagi yang telah meninggal dunia, pada 4/6/2011 jam lebih kurang 11.00 malam, di kaki lima di antara kedai nombor 24 dan 26, Jalan Tasek SS/1, Bandar Tasek Mutiara, di dalam Daerah Seberang Perai Selatan, di dalam Negeri Pulau Pinang telah membunuh Vijaindran a/l Sivanathan (No K/P: 870925-35-5591) dan dengan ini kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama dengan Seksyen 34 Kanun yang sama.

[2] It might be apposite to begin with an emphasis on a preliminary matter. As can be seen from the charge, both appellants were alleged to have committed the offence together with three other persons who, for the reasons stated in the charge, were not charged and tried in the instant case before the court of first instance. One of them, namely Arumugam a/l Shanmugam, also known as Alleycat, had already been charged with the offence separately in 2014 whilst the second person who was still at large, was Kalaimogan a/l Chelamuthu also known as Sassi or Taukley. The third person was Yogaran a/l Veeriah who apparently passed away before the appellants were charged. Yogaran a/l Veeriah was also known as Kuthai. Arumugam a/l Shanmugam was convicted by the High Court but was on appeal acquitted by the Court of Appeal (*Arumugam a/l Shanmugam v Public Prosecutor* [2014] 5 MLJ 443).

CASE FOR THE PROSECUTION

[3] With that preliminary observation, we shall proceed to state the material facts which we have garnered from the evidence led by the prosecution. On that fateful night, to be exact, on 4 June 2011 circa 8.30pm, before the murder, Kamalraj a/l Muniandy ('PW10') was outside Mahen's house at Taman Enggang Indah, Pulau Pinang chatting to Mahen whilst seated on a motorcycle. At that time, the first appellant and his younger siblings namely the second appellant and Sassidaran came on a motorcycle. The first appellant told Mahen that Sassidaran was beaten up by Mahen's father-in-law. In the event which soon transpired, the first appellant slapped PW10 accusing him of telling Mahen's father-in-law to beat up Sassidaran. In the meantime, PW10 also saw the second appellant hid a machete under a flower pot in front of Mahen's house. As they were arguing, PW10 left the place and returned home.

Upon his return, PW10 telephoned and informed the deceased that he was slapped by the first appellant.

[4] At about 9.30pm, the deceased came to PW10's house after which they went to sit on a concrete TM Box to drink alcohol. Around 11pm, Alleycat and Kuthai came. Kuthai wanted to talk to PW10 but PW10 told Kuthai that they should talk tomorrow. PW10's response prompted Kuthai to accuse him of being rude (*kurang ajar*) and in the ensuing moment, Kuthai slashed PW10's right thigh with a machete. Upon seeing the incident, the deceased left the place on a motorcycle with Kuthai in close pursuit. PW10 in the meanwhile went to the house of the deceased's employer by the name Sri and informed him that Kuthai had slashed his right thigh and that Kuthai was hot on the deceased's heels. Just a moment after that, Sri received a telephone call from a volunteer (*sukarelawan*) who informed him that the deceased was slashed near the place where the deceased worked. Both of them then went to the place in question and there PW10 saw the deceased sprawled in a pool of blood on a mosaic floor outside a shop with slash wounds on his body. The deceased was brought to the hospital in an ambulance.

[5] Sundareson a/l Muniandy ('PW12') in his evidence told the court that on 4 June 2011, he lived at No 18A located on the first floor and worked at No 18, Sri Future Auto on the ground floor of a shophouse at Jalan Tasek SS/1, Bandar Tasik Mutiara, Pulau Pinang. Whilst he was resting after coming home from work, PW12 heard the deceased calling his name and asked him to come downstairs. The deceased looked worried. When PW12 asked him the deceased said Kuthai had slashed PW10 and the deceased fled on a motorcycle as he was scared. The deceased also told PW12 that Kuthai was chasing him. PW12 met the deceased at the five foot way of the shop where both of them worked. They were talking for about ten minutes when the appellants, Sassi, Kuthai and Alleycat, came on three motorcycles. On seeing them, the deceased pushed his motorcycle and parked it at the next shop. The deceased thereafter was surrounded by the appellants, Sassi, Kuthai and Alleycat. Each of them carried a machete. They tried to slash the deceased but the deceased used a helmet to ward off the blows. The second appellant then kicked the deceased and slashed his back. PW12 shouted at the second appellant saying why did he slash the deceased who had helped him many times. The second appellant moved back. At that time the deceased tried to flee, however, one of the five assailants threw a helmet which hit the deceased causing the deceased to almost fall down.

[6] The deceased continued to run with the five assailants in close pursuit until they reached in front of a shop, De' Sri Enterprise when one of the assailants pulled the deceased's sling bag until he fell down. PW12 was about ten feet from them and he could see clearly as the scene of crime was sufficiently

lighted by the street light and the light at the five foot way. At that point of time, all the five of them started to hack the deceased slashing him until he fell down. They continued to slash the deceased whilst he tried to defend himself using his hands. PW12 approached and told them to stop slashing the deceased. Kuthai then told the second appellant to hack PW12. The second appellant and Alleycat approached PW12 and put the machetes on PW12's neck. They took PW12 to the shop where he worked but PW12 pushed both of them and ran towards the deceased. In the meantime, the first appellant, Kuthai and Sassi continued to hack the deceased with the machetes. According to PW12, the attack lasted approximately 10–15 minutes and he could see the five of them slashing the deceased since the scene of crime was sufficiently lighted. He knew all the five of them as they lived in the same housing area. The evidence led by the prosecution showed that when members of public who were at a nearby restaurant came to the scene, the five assailants fled on their motorcycles. The deceased was subsequently sent to Hospital Sungai Bakap at about 1am on 5 June 2011 and was pronounced dead at 2.40am. Based on the post-mortem report ('exh P29') and the evidence of the pathologist Dato' Dr Zahari bin Noor ('PW13'), the deceased's death was due to massive loss of blood caused by multiple slash wounds inflicted by sharp weapons.

FINDINGS AT THE CLOSE OF CASE FOR THE PROSECUTION

[7] At the close of case for the prosecution, the learned judge considered the evidence of PW12 which described in great detail how the appellants and three others came to the place where he lived and worked and slashed the deceased repeatedly with long machetes which they carried with them at the time in question. The learned judge was satisfied that PW12's testimony was not shaken on cross-examination and that there were no reasons for PW12 to make up a story or to victimise both appellants. After watching PW12's demeanour when he gave his evidence in court, the learned judge found that PW12 was a credible witness whose evidence could be acted upon and indirectly corroborated by PW10 whose testimony showed that the deceased was chased by Kuthai after Kuthai had slashed PW10's right thigh at TM Box. PW12, according to the learned judge, had witnessed the appellants and their three accomplices slashed the deceased repeatedly even though PW12 had tried to stop them from doing so. They chased the deceased until De' Sri Enterprise and continued to hack the deceased, and the act of the appellant and three other accomplices had evinced the common intention to kill the deceased. The post-mortem report showed that there were 22 serious slash wounds found on the deceased's limbs which clearly showed that the appellant's and their accomplices had the intention to kill the deceased. Upon undertaking a maximum evaluation of the evidence, the learned judge accordingly concluded at the end of the prosecution's case that the appellants' act constituted murder which fell under s 300(a) of the Penal Code or otherwise under s 300(b) thereof as such act was done, with the intention to cause bodily injury to the deceased

which the appellants knew to be likely to cause the deceased's death. Besides, it was clear to the learned judge that the injuries caused by the appellants together with the other three accomplices were the cause of the deceased's death. The deceased died in one hour and 40 minutes after he was taken to the hospital due to massive bleeding caused by multiple slash wounds inflicted by sharp weapons.

THE DEFENCE

[8] Both appellants gave their evidence on oath. We lay down the salient facts which we discern from their testimony. The first appellant in his defence testified that on 4 June 2011 at about 11pm when he was having meals with his girlfriend at Valdor near Jawi, he received a telephone call from his friend informing him that Kuthai brought a knife and he wanted to go to SS1, Tasik Mutiara, to fight. Riding his motorcycle, the first appellant went to the place in question and on arrival there he saw Kuthai and the deceased were involved in a fight. He tried to stop the fight but his attempt was to no avail. He then left the place and as he was leaving, the first appellant saw Kalirajen ('DW3'), the second appellant and Kalaimogan (Sassi or Taukley) at a tom yam shop near the scene. The first appellant told them that Kuthai and the deceased were involved in a fight and forbade them from going to the scene. He returned to his sister's house immediately after telling them about the fight. The first appellant explained that he went to the scene in order to stop the fight.

[9] The second appellant, when he was called to testify, said that on 4 June 2011 around 11pm, he was at the tom yam shop, Bandar Tasik Mutiara with DW3 and Kalaimogan. He heard a commotion and the customers at the restaurant rushed out to find out what was the commotion all about. The second appellant saw two persons whom he did not know were involved in a fight. At that point of time the first appellant came and told the second appellant to leave the place. The second appellant, DW3 and Kalaimogan therefore left the scene whilst the fight continued.

[10] The defence called only one witness namely DW3 to testify. In his evidence, DW3 told the court that he heard a commotion outside the tom yam shop and he went out to see what happened. As with the first and second appellant, DW3 testified that two persons were fighting. At that time in question, the first appellant came and told DW3, the second appellant and Kalaimogan to leave. They left the scene and so was the first appellant. DW3 also testified that Kuthai was involved in the fight with another person whom he did not know.

DECISION OF THE TRIAL JUDGE AT THE CONCLUSION OF THE TRIAL

[11] The learned judge found that the defences of both appellant were bare denials. Their versions were in direct contradiction to the evidence of PW12. But the learned judge accepted the detailed testimony of PW12 and the fact that he was able to relate the chronology of the incident clearly made his evidence more credible. There is, moreover, the evidence that PW12 was involved in trying to stop the fight between the appellants together with the other three accomplices and the deceased. The second appellant and Alleycat had also placed the machetes on his neck when the first appellant, Kuthai and Sassi, continued to hack the deceased. His evidence was also supported by the evidence of PW10. On the contrary, the evidence of the appellants, the learned judge found, was a mere denial and although it was supported by DW3's testimony, it did not mean that it was the truth. Based on the whole evidence, the learned judge rejected the evidence of DW3. The learned judge concluded by holding that the defence failed to raise a reasonable doubt in the prosecution's case and that the prosecution had succeeded in proving the charge against the appellants beyond reasonable doubt. They were accordingly found guilty as charged and sentenced to death.

THE APPEAL

[12] The petition of appeal sets out 18 grounds upon which the appellants seek to ventilate their arguments before this court. However, learned counsel for the appellants at the commencement of the hearing of the appeals informed us that the main plank in his oral submission would be premised on two grounds only. These grounds learned counsel submitted, concerned firstly, the rejection by the learned trial judge of the evidence of the appellants and their only witness, DW3 and secondly, the credibility of PW12 whose evidence learned counsel submitted, was questionable.

OUR DELIBERATIONS AND DECISION

[13] We think it is legitimate to begin by stating the obvious, that, the long-established and trite principle relating to the onus upon whom an offence is required to be proved against an accused person lies with the prosecution that bears the burden to prove its case beyond reasonable doubt. What that principles entails is that for an offence under s 302 of the Penal Code, it behoves the prosecution to establish all the essential elements of the said offence against an accused person and insofar as this case is concerned, these are:

(a) the deceased died;

(b) he died as a result of the bodily injury sustained by him and that such him bodily injury was inflicted by or the result of the act of the appellants and their three accomplices; and

(c) the appellants committed such act:

(i) with the intention of causing the deceased's death (s 302(a)); and

(ii) with the intention of causing such bodily injury as the appellant knew to be likely to cause the deceased's death (s 302(b)).

[14] Since the offence with which the appellants were charged were alleged to have been committed in furtherance of their common intention pursuant to s 34 of the Penal Code, it is incumbent upon the prosecution, in addition to the above requirements, to also prove that the criminal act was done by the appellants in furtherance of their common intention.

[15] There was without question, on the irrefragable evidence before us, that the first requisite element of the offence had been proved by the prosecution. It was also not disputed that the deceased's death was caused by the bodily injuries sustained by him and the act of inflicting such bodily injuries was committed with the intention of causing the deceased's death or otherwise, the act was committed, as the learned judge correctly put it, with the intention of causing the injuries in question as the appellants knew to be likely to cause the death of the deceased thus bringing their act to fall under s 300(a) and (b) of the Penal Code. It is apparent, therefore, that the critical question which immediately arises is whether it was the appellants and their three accomplices or Kuthai who inflicted those bodily injuries by which the deceased succumbed to death. May it be remembered, the appellant's defence was that they were not involved in the fight involving the use of the deadly weapons, the fight was between Kuthai and the deceased. The blame, based on the defence version, therefore fell squarely on Kuthai. Herein thus lies the pertinent question for our detcemination in this appeal.

[16] Taking the first ground, the issue here is whether the learned judge, in convicting the appellants, erroneously rejected the evidence of the appellants and DW3. We had listened to an argument, strongly pressed by learned defence counsel, as we understand it, that the learned judge did not consider the failure on the part of PW10 and PW12 to lodge a police report about the incident in which the deceased was murdered. Learned counsel asserted that although they told the court that the appellants together with several other assailants continuously hacked the deceased in their presence, they did not lodge a police report. What was more puzzling, learned counsel emphasised, was that PW12 was threatened with the machetes by the second appellant and Alleycat. Further, both PW10 and PW12 did not tell the court the motive that had led the appellants to kill the deceased. It was manifestly possible, learned

A counsel submitted, that based on PW10's evidence, it was Kuthai who was angry and had the motive to kill the deceased because PW10 saw Kuthai chase the deceased after PW10 was slashed by Kuthai. Based on the evidence of PW10 and PW12, it was clear that Kuthai had a problem with the deceased culminating with the deadly fight between the two of them ending in the result B with the death of the deceased.

[17] PW12 is the witness in whose presence the incident occurred. He described in great details how the deceased met his fate during the fight. His narrative showed that the deceased came to the place where he lived and PW12 C met the deceased at the five foot way of the shop where he worked. The deceased told PW12 that PW10 was slashed by Kuthai and PW10 fled on a motorcycle with Kuthai chasing him. As both of them were talking, the appellants and their three accomplices came on threemotorcycles. They started D to surround and attack the deceased with the machetes and this was seen by PW12 who testified that all the five of them slashed the deceased. At one stage PW12 approached the assailants and told them to stop. Kuthai was heard by PW12 telling the second appellant and Alleycat to hack PW12. When the second appellant and Alleycat placed the machetes on his neck, PW12 pushed E them away and ran towards the deceased. The first appellant, Kuthai and Sassi continued to attack the deceased. The attack lasted between ten to 15 minutes and the appellants and their accomplices fled on their motorcycles when members of public who were at the nearby restaurant rushed to the scene. PW12 was about ten feet from the appellants and the rest of the assailants and F he could see clearly as the scene of crime was sufficiently lighted by the street light as well as the light at the five foot way. PW12's evidence that the place was lighted was supported by the evidence of PW14, the investigating officer who testified that the street light was approximately five meters away from the scene. PW12's evidence was also consistent with PW14's evidence which revealed that G the five foot way was also sufficiently lighted.

[18] Thus, clearly, the evidence that we could garner from PW12's testimony showed that the appellants, Alleycat who was already charged separately in 2011, Sassi aka Taukley who was still at large and Kuthai who had H already passed away were acting in concert when they were seen by PW12 arriving at the scene of crime together and hacking the deceased. The combined effect of their acts, the weapons used and the multiple injuries inflicted on the deceased clearly evinced an intention on the appellants' part to cause the deceased to die or sufficiently showed knowledge on the part of the I appellants that the injuries inflicted would be likely to cause the death of the deceased thus bringing their act to fall under s 300(a) and (b) of the Penal Code. It is instructive to reproduce a passage from the judgment of this court in the case of *Mohd Bakri bin Belaho v Public Prosecutor* [2008] 1 MLJ 190 which we think is relevant to the present appeal:

> [68] Combining the effect of the weapons used in the incident, together with the nature of the wounds inflicted, the part of the body on which the injuries were inflicted, with the probability of death resulting being high, everything pointed to an intention to cause death or injury sufficient in the ordinary course of nature to cause death. From the severity of the wounds as caused by that chopper and the other knife for stabbing purposes, the appellant could not now come forward and say that he was unaware that those wounds would in all likelihood have caused death, let alone that they were accidental or unintended.

Their criminal act in actuality was, as it is clear to us, in furtherance of the common intention of all of them to cause the death of the deceased or to cause the injuries which they knew to be likely to cause the death of the deceased to whom such injuries were caused. There is thus not a scintilla of doubt in our minds that s 34 of the Penal Code applies to this case which is provided as follows:

> 34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[19] Each of them, by virtue of s 34 of the Penal Code, was liable for the appalling injuries by which the deceased's death was caused as if the injuries were done by him alone. To express our understanding of the law on the subject of common intention, it must be taken to be well-settled that there is no legal requirement on the part of the prosecution to prove who actually caused the death of the deceased or who exactly the actual doer of the offence in question was. The Court of Appeal in *Ahmad Majmi bin Idris & Anor v Public Prosecutor and another appeal* [2014] 3 MLJ 368; [2014] 1 LNS 148 explained the law on the application of s 34 of the Penal Code in language that merits recollection:

> [18] ... In our judgment, when s 34 of the Code is invoked, there is no requirement to prove who actually or ultimately caused the death of the deceased as was held in *Ong Chee Hoe & Anor v Public Prosecutor* [1999] 4 SLR 688:
>
> > In any case, the effect of invoking s 34 made it unnecessary to determine who exactly the actual doer of the offence in question was. In the Privy Council decision of *Barenda Kumar Ghosh v King Emperor* AIR [1925] PC 1, the court stated:
> >
> > > Section 34 deals with the doing of separate acts, similar or diverse, by several persons; but if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

[20] In addition, this court in *Chandran a/l Paskaran v Public Prosecutor* [2011] 3 MLJ 731; [2011] 2 CLJ 585 said:

> [23] PW5 did not see the appellant slashing the deceased. He only saw the appellant

who was holding a parang going towards the group that was attacking the deceased. PW5 saw the deceased being attacked but he could not see the faces of the attackers. On the evidence the learned trial judge held that the appellant had acted with the common intention of causing bodily injury to the deceased which was sufficient in the ordinary course of nature to cause death. We agree. The appellant arrived at the crime scene together with the other assailants and were armed with parangs. The other assailants slashed the deceased. The appellant left the crime scene with the group. As such the appellant is responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence (see *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603).

[21] Likewise, the appellants in the instant case arrived at the scene of crime together with the other three assailants armed with the machetes and after attacking the deceased with the machetes, all the five of them left the scene together. We have no hesitation to hold in our judgment that their acts in inflicting the gruesome injuries culminating ultimately in causing the death of the deceased were clearly executed in furtherance of the common intention of all irrespective of the role the appellants played.

[22] The appellants and their accomplices did not wear any mask and there was no obstacle that could prevent PW12 from recognising them. Besides, PW12 stressed that he had known the appellants prior to the gruesome incident as they lived in the same residential area. There was without question, positive evidence about the identity of the appellants which we could glean from PW12's testimony and the full worth of such material evidence ought significantly to be recognised. In the case of *Public Prosecutor v Basar* [1965] 1 MLJ 75, Gill J in considering the issue of identification there had this to say at p 76:

... the learned magistrate acquitted the respondent at the end of the case for the prosecution, his ground for such acquittal being that PW1's evidence could not be relied on in so far as identification alone was concerned. He stated in his grounds of judgment that a court should scrutinise very carefully any evidence relating to the identification of an accused person. I had no reason to quarrel with his general statement on that point but what he, in my opinion, failed to appreciate was that there was positive evidence about the identity of the respondent by PW1 who admittedly had known him for some time and had seen his face by the flashes of lightning.

[23] It is a pertinent point to note that PW12's evidence that he had known the appellants prior to the incident was not challenged by the defence at all as such the evidence, in our judgment, must be accepted. The fact that PW12 had known the appellants previously and that he was only about ten feet from them at that material time with the scene of crime sufficiently lighted made this identification more a case of recognition than mere identification (*Muharam*

bin Anson v Public Prosecutor [1981] 1 MLJ 222 at p 224). There was no error whatsoever in the directions by the learned judge on the issue of identification of both appellants and their three accomplices. This issue of identity of the appellants and their accomplices in this case according to this court in *Tan Kim Hoo v Public Prosecutor & another appeal* [2007] 6 CLJ 557 (at pp 558–567 paras 12–13) was a question of fact and must be determined by a trial court. The learned judge whilst accepting the evidence of PW12 which remained unshaken throughout cross-examination did not see any reason why PW12, in the absence of any ill motive on his part, would fabricate evidence to victimise the appellants. We have scrutinised the evidence of PW12 and we could not come to a finding different from the trial court's finding that it was the appellant's and the other three accomplices who attacked the deceased which resulted in his death.

[24] The next point in the submission of learned counsel was that PW10 and PW12 failed to show the motive on the part of the appellants in killing the deceased. It is a long-established principle of law that in a charge for murder under s 302 of the Penal Code, motive is not an essential element of the offence, but the element of the intention or mens rea is. Thus for the offence of murder, for which the appellants are charged, mens rea is proved if it can be shown that the appellants had the intention to cause the deceased's death or an intention of causing such bodily injury as they knew to be likely to cause the deceased's death. Motive would probably become relevant if the prosecution's case essentially is dependent on circumstantial evidence. Nevertheless, motive becomes less significant, is no longer relevant and not an essential feature to drive home the charge where there is an eyewitness such as PW12 or where there is direct evidence as is in the instant case from which the element of mens rea could manifestly be said to be present or existent. And may it be remembered, the evidence of PW10 too unravelled the events leading to the unfortunate yet gruesome incident, hence lends credence to PW12's testimony.

[25] In *Aung Thun & Anor v Public Prosecutor and another appeal* [2014] 1 MLJ 784 this court, in the judgment of Hamid JCA, whilst dealing with the issue of motive in murder cases said:

> [13] In addition we must say learned counsel's argument that the prosecution ought to have shown motive for the murder has no merits on the facts of the case. Motive may be essential if it is a case where the prosecution is relying on circumstantial evidence. Unlike common law offence of murder, the statutory offence of murder or manslaughter based on ss 299 and 300 of the Penal Code strictly does not require motive as an element to be proved. If at all evidence of motive is introduced by the prosecution where direct evidence is available for homicide then it is only meant to strengthen the probative force of the prosecution case and/or to negate the defence of self defence or provocation, etc at the earliest stage.

[26] It ought to be emphasised that the element of intention is to be distinguished from motive. While it can be accepted that motive if shown may bolster the inference that an intention to commit an offence exists, the absence of motive however need not necessarily signify the absence of intention as well. In the case of *Public Prosecutor v Oh Laye Koh* [1994] 2 SLR 385 the Singapore Court of Appeal explained this position clearly when it said:

> [2] The element of 'intention' is to be distinguished from 'motive', even though the presence of a motive may bolster the inference that an intention to commit the offence was existent. The absence of motive, however, need not necessarily mean that no intention was present.

[27] Another point that was raised by learned counsel concerns the failure on the part of PW12 in not reporting about the offence to the police. Learned counsel referred to the case of *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1 to support his contention on this point. But in *Lee Ah Seng*, it is necessary to mention that Hassan Lee lodged his police report as the first information report but it was lacking in certain details and by his own admission, Hassan Lee deliberately omitted to mention the important second half events that were related to the involvement of the appellants. According to the Federal Court, the veracity of Hassan Lee was brought into question by reason of several discrepancies between his police report and his evidence. The explanation given by Hassan Lee on the omission was found to be inherently improbable and therefore the truth of his evidence became open to at least a reasonable doubt. The Federal Court therefore rejected the report. *Lee Ah Seng*'s case in our opinion, can be distinguished from the present case.

[28] Firstly, in the present case, PW12 did not lodge the first information report. The first information reports (exhs P11 and P12) were lodged by a police personnel. There was, moreover, no issue of discrepancies of evidence of PW12 and exhs P11 and P12. Secondly, PW12 had explained that his statement was recorded by the police on the night of the incident itself and since he had already given the statement he did not see any necessity to lodge a police report. We are of the opinion that PW12 had given an explanation which was not inherently incredible, he being a layman, had logically thought that since he had already given his statement to the police to assist them in their investigation and being ignorant as he was of the procedure, there was no further necessity to make a police report. The Federal Court in *Lee Ah Seng*, at para 38, recognised that '… if there was a reasonable explanation for the failure, it should not have any effect on the veracity of Hassan Lee'.

[29] The issue in *Lee Ah Seng* involved the question of discrepancies of the evidence of Hassan Lee and his police report. In the instant case, the learned judge found that the credibility of PW10 and PW12 was unshaken and therefore the failure of PW10 and PW12 to lodge a police report which, in law,

is not substantive evidence, would not affect the prosecution's case. We are satisfied that the learned judge was absolutely right in rejecting this argument. What really matters in this case is the evidence of PW10 and PW12 on what they heard and saw as well as the findings of the learned judge on their credibility and the inherent probability of their evidence. We now quote the decision of this court in *Abdulloh Saofi v Public Prosecutor* [2013] 2 MLJ 640 which considered this point:

> [19] Finally, learned counsel complained that the police report (exh P32) lodged by PW7 did not mention the role played by PW11 in this case. We found no merit in this complaint. A police report is not an encyclopedia. It can never be treated as a piece of substantive evidence. It is not the beginning and ending of every case (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209; [1969] 1 LNS 52 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 321). In the context of the present case, what is most important is the testimony of PW11 in court on what he heard and saw and the findings of the learned trial judge on the credibility of PW11 and the inherent probability of his testimony.
>
> [20] We had scrutinised the entire evidence in the appeal record and the judgment of the learned trial judge in the light of the various criticisms made by learned counsel for the appellant. We found that the learned trial judge had not misdirected himself on facts and law. The decision of the learned trial judge was neither perverse nor against the weight of evidence. We found the conviction of the appellant safe.

[30] To illustrate further on the same point, the Federal Court in the case of *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 did not treat a police report as a substantive evidence. Accordingly, based on the aforesaid reasons and the case authorities cited above, we do not think that anything material turns upon the argument of learned counsel on this issue and the matter thus admits of no further argument.

[31] Learned counsel complained that the learned judge failed to consider that the prosecution omitted to explain what happened to Kuthai and such failure was fatal to the prosecution's case. The investigating officer, PW14 in his evidence testified that Arumugam a/l Shanmugam ('Alleycat') and the first appellant were respectively arrested on 5 June 2011 and 23 June 2014 whereas the second appellant and Kalaimogan a/l Chelamuthu ('Sassi or Taukley') surrendered themselves at the police station on 25 June 2014. Apparently, Kuthai could not be found and was later discovered that he had passed away. The appellants were charged with murder that was alleged to have been jointly committed with Kuthai and two others. Alleycat was charged in 2011 under s 302 of the Penal Code for the murder of the deceased. Kuthai, so far as the evidence showed, was not a witness, he was one of the accused persons who could have been convicted like the appellants had he been found or alive. The learned judge correctly found that the evidence of the prosecution witnesses in particular PW12 was sufficient to prove the prosecution's case even if Kuthai

was not called as a witness. In our judgment, the overwhelming evidence of PW10 and PW12 was clearly sufficient to prove that the appellants together with the other three persons, intentionally caused the death of the deceased under s 302(a) or caused bodily injury which they knew to be likely to cause the deceased's death under s 302(b) of the Penal Code. The evidence of the pathologist, PW13, confirmed that the deceased died due to massive bleeding caused by multiple slash wounds inflicted by sharp weapon. This evidence was consistent with PW12's evidence that the five assailants repeatedly hacked the deceased on that fateful night. We agree with the learned judge that the absence of Kuthai would not be fatal to the prosecution's case and His Lordship was right in finding a prima facie case against the appellants.

[32] The general tenor of the defence evidence clearly showed a complete denial of the appellants' culpability in the murder of the deceased. Both appellants completely steered clear of any involvement in the incident. Briefly, the evidence of the appellants and DW3 can be neatly summarised as follows:

(a) whilst the first appellant was having meals with his girlfriend Shoba at Valdor, he received a telephone call from Raj telling him that his younger brother Kuthai brought a knife on his way to fight at Tasik Mutiara;

(b) the first appellant went to the scene of the crime to stop the fight, but he was scolded by Kuthai who, whilst trying to slash the first appellant, told the first appellant that this was his problem and warned him not to meddle in his affairs;

(c) the first appellant left the place and as he was leaving, he met the second appellant, DW3 and Kalaimogan (Sassi) at the tom yam shop. He went home after that;

(d) the second appellant denied that he was at the crime scene, instead he was at the tom yam shop near the scene of crime;

(e) as the second appellant was eating with DW3 and Kalaimogan (Sassi), the first appellant came on a motorcycle and told them that there was a fight nearby and told them to leave;

(f) when the appellants and their friends left the fight still continued;

(g) DW3 said that when he was having meals at the tom yam shop with the second appellant and Kalaimogan (Sassi), he saw people involved in a fight;

(h) as he wanted to know what happened, he and his friends went out of the shop and saw the first appellant coming on a motorcycle;

(i) the first appellant informed DW3 about the fight and told them to leave; and

(j) DW3 saw Kuthai slashing someone.

[33] The first appellant took between ten to 15 minutes to reach the place where the fight was taking place simply because he wanted to stop the fight. Yet he left the place after Kuthai, his own brother told him not to meddle in his affairs and threatened to harm him. It is hard to believe that the first appellant who purportedly tried to stop his brothers and the deceased from fighting had almost caused him to be slashed by his own brother. It is also equally incredible that the appellant, whilst leaving the place to stop at the tom yam shop to tell the second appellant, Sassi and DW3 to leave as well. A pertinent question was, why was there a need to tell them to leave while they were in the midst of having their meals. They were at the tom yam shop, not at the scene of crime. Next, why did they leave, when they were not involved in the fight at all. We need only say on the aspect of the first appellant's defence that after we have considered the evidence in its entirety, the correct version, would be that the appellants, Sassi, Kuthai and Alleycat were involved in the fight with the deceased. This was manifestly proved by the evidence of PW12 which renders the appellants' defences too good to be true and therefore it was right for the learned judge, upon considering the evidence in its entirety, to reject the appellants evidence.

[34] As for DW3, he was obviously trying to help both appellants. He knew them long before that but became very close six months prior to the incident. He was undoubtedly, an interested witness whose evidence should be treated with caution as he was a witness having a purpose to serve (*Deepanraj a/l Subramanian v Public Prosecutor* [2016] 1 MLJ 413; [2015] CLJ 439 at p 450). DW3 was not involved at all, but a question must be asked as to why he was in a hurry to leave. The learned judge, in scrutinising the evidence of the appellants and DW3 pointed out that their evidence was a diametrically opposed version when considered in light of PW12's testimony. After carefully evaluating the evidence adduced by the defence and at the same time taking into account the prosecution's evidence, the learned judge held that PW12's evidence was more detailed and was able to narrate the chronology of the attack against the deceased on the night of the 4 June 2011 in a convincing and credible manner. More so when PW12 was also involved when he tried to stop the five assailants from continuing to hack the deceased and that the second appellant and Alleycat placed the machetes on his neck. His evidence relating to the fact that the deceased was chased by Kuthai was supported by PW10 himself. The learned judge concluded by rejecting the evidence of the appellants and DW3. His Lordship's reasoning is in our judgment impeccable and the conclusion arrived at by the learned judge is faultless.

[35] One pertinent point which we would like to make as well is that PW12 would not have known about the appellants' culpability together with the three accomplices if he did not witness the murder. There was no ill motive shown or suggested to PW12 or there was no basis for suspecting the appellants that

prompted PW12 to give their names to the police as suggested by learned counsel during PW12's cross-examination. The whole incident in truth clearly occurred with the involvement of the appellants and their three accomplices.

[36] For the above reasons, we are satisfied that the learned judge was correct when in the end His Lordship dismissed the appellant's defence as mere denials of the evidence connecting them with the offence and rejected DW3's evidence in consequence. It is trite law that a mere denial without other proof to reasonably dislodge the prosecution's case is not sufficient (*Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324 at pp 325–326; *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195).

[37] Moving on, we were pressed with the argument by learned counsel that PW12 was not a credible witness. We were told by learned counsel that in another case wherein Alleycat was charged under s 302 of the Penal Code for the murder of the deceased, the evidence of PW12, who was PW7 in that case, was rejected by the Court of Appeal (*Arumugam a/l Shanmugam v Public Prosecutor* [2014] 5 MLJ 443). The appellant in that case was consequently acquitted and discharged by this Court. However, in the High Court, PW7's evidence was accepted by the learned trial judge as credible (*Pendakwa Raya v Arumugam a/l Shanmugam* [2013] MLJU 155; [2013] 1 LNS 57). It might be apposite to bear in mind that the law governing the relevancy of judgments of court is governed by the Evidence Act 1950 of which s 43 thereof is applicable to this case. The said section provides:

> 43 Judgments, orders or decrees other than those mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provisions of this Act.

[38] This section provides a general rule that other than those judgments mentioned in ss 40–42, judgments of court are irrelevant unless the existence of such judgments is a fact in issue or is relevant under some other provisions of the Evidence Act 1950. There is nothing in the Evidence Act 1950 which allows statements or finding of fact in another case to be used as evidence in a subsequent case to decide the points which are in issue in the subsequent case (*DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22 at p 54). What is rendered relevant by the section is the existence of a judgment but its contents is not. The object behind enacting s 43 according to *Sarkar, Law of Evidence* (16th Ed Reprint 2008 p 952) appears to be two fold:

> (1) to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties to another case; and
>
> (2) to maintain the independence of courts by preventing the parties from submitting before the court hearing their case the judgments of other courts ... There is no provision in the Act by which the actual decision or the

findings arrived at in a previous judgment can be used as evidence to decide the points which are in issue in a particular case. Such a decision may operate as *res judicata* or be relevant under ss 40–42 to prove assertion of a right, but otherwise it is no better than a mere opinion expressed on the issues in a particular case and opinion is relevant in those cases only in which it is specially referred to in the Act and in no others (*Purnima v Nandlal* PLT 528; *Ramparikha Pandey v Mt Ramjhari Kuer* AIR 1933 Pat 690; *Hitendra Singh v Rameshwar Singh* AIR 1925 Pat 625). Statements of facts in a previous judgment is not admissible under s 43 in a subsequent case to decide any points in issue (*Khub Narain v Ramchandra Narain* AIR 1951 Pat 340 (P)).

[39] The Evidence Act 1950 does not make a finding of fact arrived at on the evidence before the court in one case evidence of that fact in another case (*Kumar Gopika Raman Roy v Atal Singh* AIR 1929 PC 99). Clearly, s 43 does not apply to the instant case as the judgment in *Arumugam*, is not a fact in issue or relevant under some other provisions of the Evidence Act 1950. Now, s 43 of the Evidence Act 1950 provides an exception to the general rule stipulated therein, that is, where judgments of courts fall within the ambit of ss 40–42, such judgments are relevant. However, having examined these sections, we are satisfied that the judgment referred to by learned counsel does not fall within these three sections. In our opinion, s 40 does not apply to the instant case as the section deals with the doctrine of res judicata and the plea of autrefois acquit or convict which relate to the existence of a previous judgment which by law prevents any court from taking cognisance of a subsequent suit or proceedings. It renders the previous judgment relevant for that purpose or for determining whether the doctrine of res judicata or the plea of autrefois acquit or convict, as the case maybe, applies. The rule of relevancy of previous judgments under s 40 applies to civil as well as criminal cases (*Augustine Paul, Evidence Practice and Procedure*, 3rd Ed p 406). Section 41 also does not apply to the instant case as it deals with relevancy of certain judgments in the exercise of probate etc jurisdiction and whereas s 42 is inapplicable as it deals with judgments other than those mentioned in s 41 which are relevant if they relate to matters of a public nature relevant to the inquiry.

[40] It is evident that the existence of the judgment in *Arumugam* is not a fact in issue, what learned counsel sought to prove before us was that PW12's evidence in that case had been rejected by this court and that by virtue of the rejection he persuaded us to also reject PW12's evidence. Clearly that judgment is not rendered relevant by s 43 of the Evidence Act 1950. Besides, there is no presumption that a prior judgment is the correct decision on the matter (*Augustine Paul, Evidence Practice and Procedure*, 3rd Ed p 424). What has emerged from a catenation of these authorities is that, despite counsel's contention, the law is totally against the appellant on this score.

[41] That brings us to the remaining question which is whether the learned judge was correct in accepting PW12 as a witness of truth. One thing is extremely clear, that is that, the learned judge had also accepted the evidence of PW10 holding that PW10's testimony bolstered the evidence of PW12. PW10's evidence had somewhat provided the motive for the murder when he testified that on the night of the incident he was slapped by the first appellant who accused him of telling Mahen's father to bash up Sassidaran, the appellants' brother. PW10 was subsequently slashed by Kuthai who was also the appellants' brother. PW12, as we have earlier stated, was found by the learned judge to have rendered a detailed narrative of the tragic incident on the night in question. He was the eyewitness and therefore the prosecution's material witness who gave his evidence consistently and smoothly. He did not falter and neither was he hesitant. He was instead firm when he was under intense cross-examination by learned counsel. The defence, we observe, did not suggest any ill motive on the part of PW12 in implicating the appellants in the murder. There was therefore no reason for PW12 to make up a story or fabricate evidence in order to nail the appellants down to the charge. PW12 in this regard was not an interested witness, instead he was an independent eye witness who gave a full account of the incident credibly. The incident undoubtedly occurred in the presence of PW12 somewhat unexpectedly. There were no reasons for the learned judge to disbelieve PW12. Even if there were discrepancies in his evidence, such discrepancies could not be the basis to reject his testimony or were material as to render his evidence entirely incredible. We now quote from the case of *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234 a relevant excerpt from the judgment of Wan Yahya J to illustrate on this point:

> Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly tooth-combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions *but these do not necessarily render the witness's entire evidence incredible*. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded. (Emphasis added.)

[42] To quote yet another authority, in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, Raja Azlan Shah FJ authoritatively said:

> ... In my opinion, discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened ... *The question is whether the existence of certain discrepancies is sufficient to destroy their credibility*. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. *A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other*.

[43] There can be no doubt whatsoever that, after subjecting PW12's evidence to our anxious and full scrutiny, the learned judge was justified in his finding that PW12 was a credible witness whose evidence could be and was in fact acted upon by the trial court. For the reasons that we have indicated, we could not accede to the argument urged for the appellant that PW12 was not a credible witness and consequently the second ground in the appellant's contentions which relates to the issue of credibility must fail.

CONCLUSION

[44] We see no reasons to disturb the factual findings of the learned judge. His Lordship had judicially appreciated the evidence very carefully in a way that leaves no margin of doubt in our minds that the conviction of the appellants is safe. The appellants' story in connection with the entire incident was a bare denial, highly fictitious and a mere fabrication to which no degree of credence ought to be attached. In all the circumstances, and based on the reasons discussed, we accordingly at the end of the appeals came to the inevitable conclusion that the prosecution case against the appellants based on the charge against them had been proved beyond a reasonable doubt.

[45] We dismissed the appeal and affirmed the order of conviction and sentence by the trial court against the appellants on the charge under s 302 of the Penal Code.

Appeal dismissed.

Reported by Afiq Mohamad Noor